**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LASTENIA CHAVEZ** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **GLOBAL ADVANCE TECHNOLOGY, INC.** | ) | |
| Respondent | ) | Docket No. 1,041,824 |
| | ) | |
| AND | ) | |
| | ) | |
| **CONTINENTAL WESTERN INSURANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the October 28, 2009 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on February 2, 2010.

### APPEARANCES

Randy S. Stalcup, of Andover, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that in the event the Board determines the ALJ's finding with respect to the compensability of this claim is reversed, this claim should be remanded to the ALJ for further proceedings.

### ISSUES

The ALJ denied the claimant compensation finding that the claimant failed to sustain her burden of proof that her accidental injury arose out of and in the course of her employment with respondent. More specifically, he concluded that claimant's automobile

accident occurred while she was traveling on her way home from work and pursuant to K.S.A. 44-508(f), her accident was not compensable.

The claimant appealed this determination and contends the ALJ erred in his ultimate finding as to the compensability of her accident. Claimant argues that travel was an intrinsic part of her employment with respondent and pursuant to *Halford*[1], a case that remains good law in spite of the Supreme Court's recent pronouncement in *Bergstrom*[2], claimant is entitled to benefits under the Kansas Workers Compensation Act (Act).

Respondent argues claimant was injured in a motor vehicle accident that occurred while she was commuting to her home from work, an activity that is expressly excluded from coverage under the Act, both by statute (K.S.A. 44-508(f)) and based upon a strict construction of the provisions of the Act, as required by *Bergstrom*. Accordingly, respondent contends the ALJ's Award should be affirmed in all respects.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board concludes the ALJ's Award should be affirmed, albeit for a different legal reasoning.

It is clear from the parties' briefs and the ALJ's Award, that there is no dispute as to the underlying facts surrounding claimant's claim. Rather, it is the application of the law to those facts which are at the heart of this dispute. The legal dilemma stems from the fact that claimant was traveling home to Wichita, Kansas from her work site in McPherson, Kansas, commuting in a vehicle owned by her employer, when she was involved in an accident that caused her injury.

At the time of the accident claimant was not earning a wage but had concluded her work day and was riding back to her car (in Wichita) in a van that was provided by her employer. Claimant was not required to ride in the van but could elect to do so if she desired. And if she rode in the van she then had to contribute to the cost of the gas used to operate it. The van was provided by respondent as a means of conveyance from its premises in Wichita to the work site in McPherson. Claimant and her husband (who was also an employee of respondent) would meet co-employees at the respondent's parking lot in Wichita and drive together to McPherson in the van.

In order for a claimant to collect workers compensation benefits she must suffer from an accidental injury that arose out of and in the course of her employment. The

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[1] *Halford v. Norwalk Co.,* 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

[2] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[3]

K.S.A. 2007 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2007 Supp. 44-508(f) is a seen as a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[4] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[5]

But K.S.A. 2007 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's

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[3] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[4] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[5] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

premises.[6] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[7] The Kansas Appellate Courts have also determined the "going and coming" rule is not applicable and a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[8] This was most recently recognized by the Court of Appeals in *Halford*.[9]

The Kansas Supreme Court has recently held that in the context of workers compensation and the determination of whether a claimant is entitled to a permanent partial general (work) disability, there is no need to consider the parties' relative "good faith" in finding or retaining a post-injury job.[10] This holding specifically rejected a rather lengthy line of cases dating back to 1994. The import of the *Bergstrom* decision is arguably significant in this claim, in that the *Bergstrom* Court declared that the express language of the statute controls, regardless of earlier judicial interpretations of the statute.[11] As noted by the ALJ, ***"Bergstrom*** would appear to overrule precedent recognizing an intrinsic travel exception, where the clear, unambiguous language of the statute contains no such exception."[12]

When faced with this dilemma presented by the express language of the statute and the judicially carved exceptions regarding travel, the ALJ found as follows:

> The clear, unambiguous language of **K.S.A. 44-508(f)** bars [c]laimant's claim, as she was on her way home after completing the duties of her employment at the time of her unexplained accident. There is no language in **K.S.A. 44-508(f)** that exempts

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[6] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[7] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[8] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

[9] *Halford*, 39 Kan. App. 2d 935 (2008). But see the concurring opinion of Justice Leben, who asserts that the "intrinsic travel" exception is not an exception at all but is "firmly rooted in the statutory language". (*Id*. at 942). He goes on to say that "[w]here travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment" - he or she has already begun the essential tasks of the job." (*Id.*)(citations omitted).

[10] *Bergstrom*, 289 Kan. 605 (2009).

[11] *Id.*, Syl. ¶ 1 at 605.

[12] ALJ Award (Oct. 28, 2009) at 8.

> intrinsic travel from the "going and coming" rule.". . . In any event, the "intrinsic travel" exception to the "going and coming rule" has no application to the facts of the case at bar.
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> Claimant has failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with [r]espondent. Travel was not intrinsic to [c]laimant's duties as a factory laborer, and she had left the duties of her employment at the time of her injuries. Claimant's claim is barred by the "going and coming rule" of **K.S.A. 44-508(f).** (emphasis in original)[13]

Claimant argues that traveling in respondent's van from the parking lot in Wichita and to the distant work place is intrinsic to the job she was hired to perform. Claimant points out that "[c]laimant did not work for Ferguson Plastic in McPherson, Kansas but for the [r]espondent in Wichita, Kansas."[14] Thus, the accident that happened between the McPherson, Kansas site and Wichita is part and parcel of the claimant's work duties and as such, are compensable. Claimant also suggests that even if intrinsic travel is a judicially created exception to the going and coming rule it remains good law as recently at 2008, with the *Halford* decision, where the court again recognized this well known exception to the "going and coming rule". Thus, claimant argues that it would seem that in spite of the *Bergstom* directive, the "intrinsic travel" exception remains untouched and supports claimant's entitlement to coverage under the Act.

The Board has considered the parties arguments, and the record as a whole and finds the ALJ's Award should be affirmed, although the Board does so for a slightly different legal reasoning. The Board is cognizant of the holding in *Bergstrom* and notes that the import of that decision has yet to be fully developed or demonstrated. There are a whole host of potential issues that will develop from the broad brush that was used in *Bergstrom*, and that case will undoubtedly illustrate the law of unintended consequences.

Nevertheless, the Board finds that independent of the *Bergstrom* principle, claimant's claim is precluded by the statutory language contained in K.S.A. 44-508(f). Simply put, claimant was hired as a production worker. Although her employer provided a vehicle for her and her coworkers to travel back and forth to the production plant, she was not required to use the van. She was not paid for her travel time and she and her coworkers contributed to the cost of the gas. As the ALJ correctly noted,

> Claimant was not employed to drive; she was employed as a laborer in a plastics factory. Driving was thus not an intrinsic part of her job, any more than it is part of any other commuter's job. Claimant was not performing any work-related errand

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[13] *Id.*

[14] Claimant's Brief at 4 (filed Dec. 21, 2009).

at the time of her accident. She was simply going home at the end of the work day.[15]

The statute specifically forecloses claimant's claim as she was in the process of traveling home from her normal work shift *and she had yet to assume her normal work duties*. The Board need not consider whether *Bergstrom* has affected the viability of what purports to be the "intrinsic travel" exception to the statute as it finds that this claimant had yet to assume the duties of her employment until such time as she clocked in at the workplace in McPherson. And even if there remains an exception to the "going and coming rule" for positions that compel travel to be performed as an intrinsic part of the job, claimant had no such job requirement. Her job was to be performed exclusively at the plant in McPherson. Accordingly, the ALJ's Award should be affirmed.

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 28, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of March 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[15] ALJ Award (Oct. 28, 2009) at 7.

## CONCURRING OPINION

We agree with the majority that, based upon the facts, K.S.A. 44-508(f) bars claimant's case. However, we disagree with the majority's analysis that *Bergstrom*,[16] would appear to overrule precedent recognizing intrinsic travel as part of the job.

Respondent argues that as a consequence of the recent *Bergstrom* decision the only exceptions to the "going and coming" rule are the two specific exceptions enumerated in K.S.A. 2008 Supp. 44-508(f). In *Bergstrom*,[17] the Kansas Supreme Court recently held:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

The court further held:

> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.[18]

Respondent further argues that the inherent travel and special purpose exceptions to the "going and coming" rule are judicially created exceptions and, applying the strict literal construction rule of *Bergstrom*, should no longer be precedential.

The integral or inherent travel and special purpose findings in the reported judicial cases were simply judicial determinations that the "going and coming rule" was not applicable because the workers in those cases were in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. This distinction was accurately noted in the concurring opinion in *Halford* where it was stated in pertinent part:

> I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception. The statute provides that a worker is not covered "while the employee is on the way to assume the duties of

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[16] *Bergstrom v. Spears Mfg. Co.*, ___ Kan. ___, Syl. ¶ 1, 214 P.3d 676 (2009).

[17] *Id.*

[18] *Id.*, Syl. ¶ 2.

> employment." K.S.A. 4-508(f). Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment"-he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.[19]

Accordingly, the judicial precedent explaining intrinsic travel and special purpose trips simply applied the facts of those cases to the statute rather than creating a judicial exception. Finally, the *Bergstrom* case neither construed K.S.A. 2008 Supp. 44-508(f) nor overruled any cases that have interpreted that statute.

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[19] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).